

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2005-009781

02/05/2016

HONORABLE KAREN A. MULLINS

CLERK OF THE COURT  
M. Scott  
Deputy

A MINER CONTRACTING INC

DAVID W LUNN

v.

TOHO-TOLANI IMPROVEMENT DISTRICT, et al. E JEFFREY WALSH

COMPASS BANK  
NO ADDRESS ON RECORD  
CHARLES SCHWAB BANK INC  
211 MAIN ST  
SAN FRANCISCO CA 94105  
JPMORGAN CHASE BANK N A  
302 W GURLEY ST  
PRESCOTT AZ 86301  
SCOTT F FRERICHS  
MICHAEL P OBERT JR.

MINUTE ENTRY

The Court has considered Defendants' Toho-Tolani County Improvement District and Coconino County's Notice of Service of "Motion to Amend Judgment on Mandate Against A. Miner Contracting, Inc." on A. Miner Contracting, Inc., A. Miner Contracting, Inc.'s Response in Opposition thereto, Defendants' Reply, and the oral argument of counsel.

The Court has reviewed the summary judgment motions relating to damages and the mandate upon which Defendants' base their request for amendment. On July 26, 2005, in CV2005-0466, later re-filed as CV2005-019434 and consolidated herein, Toho-Tolani County Improvement District ("the District") filed an action against A. Miner Contracting, Inc. ("Miner") arising out of Miner's alleged breach of a construction contract. The District sought actual and liquidated delay damages arising from that alleged breach. On November 18, 2008,

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2005-009781

02/05/2016

this Court granted the District's Motion for Partial Summary Judgment against Miner on its claim for breach of contract. *Minute Entry Order dated November 18, 2008*. Miner attempted to contest its liability on the District's breach of contract claim but this Court rejected that attempt and that ruling was upheld on appeal.<sup>1</sup>

Having obtained a favorable ruling on its breach of contract claim, on March 24, 2009, the District filed a Cross-Motion for Summary Judgment On Damages Against A. Miner Contracting, Inc. and Safeco Insurance Company of America ("Cross-Motion"). On August 5, 2009, this Court granted the District's Cross-Motion. *Minute Entry Orders dated August 5, 2009*. Implicit in this ruling, is an acceptance of the District's statement of damages. Thus, to rule on the District's pending Motion to Amend that judgment, the Court must reconstruct the factual basis upon which this Court's prior entry of summary judgment regarding damages was grounded.

In the Statement of Facts filed in support of the District's Cross-Motion, the District offered, and the Court necessarily accepted, the following material facts: The District and Miner executed a contract in 2003 in the original amount of \$4,286,260.00. Miner failed to complete its work under the contract and abandoned its construction on June 8, 2005. After subtracting the payments the District had made to Miner before it abandoned the construction, the unpaid contract balance was \$1,843,475.82. Safeco Insurance Company of America ("Safeco") had issued a performance bond in the same amount of the original contract (\$4,286,260.00) guaranteeing Miners full and timely completion of the construction. Thus, the District demanded that Safeco, as surety, complete the construction. On September 21, 2005, the District and Safeco entered into a Takeover Agreement pursuant to which the District paid Safeco \$721,158.82 of the remaining contract balance to complete the construction, and withheld the sum of \$1,122,317.00. In the Statement of Facts, the District states that it "withheld the sum of \$1,122,317.00" and describes that sum as consisting of its out of pocket (or actual) damages in the amount of \$616,793.00 and liquidated delay damages of \$389,480.00<sup>2</sup>. The terms of the Takeover Agreement recite a litany of unresolved claims, including the District's claims that it is entitled to actual damages and liquidated damages against Safeco.

On August 4, 2010, this Court entered a Final Judgment Pursuant to Ariz.R.Civ.P. 54(b) in the form lodged by the District. Ordinarily, a party submits a judgment for the damages it is awarded, whether through summary judgment or otherwise. Here, the Final Judgment entered was the one lodged by the District and makes no mention of any damage awards, whether so-called actual damages or liquidated delay damages. That Final Judgment has been in effect for over five years.

---

<sup>1</sup> A. Miner, et al. v. Toho-Tolani, et al., 1 CA-CV 10-0665, filed September 19, 2013.

<sup>2</sup> 364 days of delay at \$1,070.00 per day.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2005-009781

02/05/2016

The District's right to liquidated damages from Miner separate and apart from actual damages, was affirmed on appeal. However, the District's right to recover these same liquidated damages from Safeco was remanded. Upon remand, this Court found that the District waived its right to recover liquidated damages from Safeco in the Takeover Agreement and therefore the District was required to pay Safeco \$389,480.00, the amount the District offset as reflected in the Takeover Agreement. *See Minute Entry Order, dated March 6, 2015.* It is important to note, however, that while the District had retained \$1,122,317.00 (of which \$389,480.00 was designated by the District to cover liquidated delay damages) the full amount retained was from the original contract--no party had yet paid any liquidated delay damages. The District argues that this Court's August 4, 2010 ruling necessarily found that the District was entitled to offset both its actual and liquidated damages against the \$1,122,317.00 however no such conclusion can be reached from the Court's decision. Rather, the District took a risk in designating \$384,480.00 as liquidated damages, hoping Safeco would ultimately be found jointly and severally liable for them and it would not have to collect them from Miner.

On April 23, 2015, after the mandate from the Court of Appeals, an Amended Judgment on Mandate was entered, again in the form lodged by the District. Once again, this Amended Final Judgment makes no mention of actual damages or liquidated delay damages and sets forth no damage amounts.

The District now seeks, through the pending Motion, amendment of the Final Judgment entered on August 4, 2010, to add a judgment for liquidated delay damages in favor of the District and against Miner in the amount of \$386,990.00 and an additional \$378,954.54 of pre-judgment interest. This District argues that because it had to pay Safeco the \$389,480.00 it had previously designated as delay liquidated damages, it is entitled to judgment against Miner for the payment of liquidated delay damages.

It has been the District's position that it could recover the liquidated delay damages from Safeco, by offsetting the amount remaining on the contract to cover its future actual and liquidated delay damages. If the District erred in withholding these amounts, the District would have to pay Safeco those amounts as they remained due under the contract, which Safeco had assumed. Here, the Court held that the District erred in withholding the liquidated delay damages from Safeco and thus was ordered by this Court to return the amount withheld, *i.e.* \$386,990.00 plus an additional \$378,954.54 of pre-judgment interest. However, because the District's right to liquidated delay damages from Miner, separate and apart from actual damages, was affirmed on appeal, and because Miner has never paid any liquidated delay damages, the District is entitled to an amendment to the final judgment to include that amount. The fact that the District could not offset the amounts owed to Safeco for those damages does not negate the District's right to those damages as determined by this Court in its entry of summary judgment in favor of the District and as affirmed on appeal.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2005-009781

02/05/2016

The District's request for interest is another issue, however. Here, the District withheld \$386,990.00 from Safeco and retained possession of those funds until this Court's ruling on March 6, 2015. The District was aware when it entered into the Takeover Agreement with Safeco that its claim to recover these liquidated damages from Safeco might be unsuccessful, as indeed it was. Therefore, the order that it pay the \$386,990.00 it had retained was a risk the District knowingly assumed. Thus, the award of interest to Safeco makes perfect sense in that context, but not in the context of Miner's obligations to the District.

Finally, because the amendment sought herein was due to the District's failure to include and resolve this issue at the time the prior judgments were entered, and because it assumed the risk that Safeco might not be found to be legally responsible for those damages, the District's request for attorney's fees is denied.

For the foregoing reasons,

**IT IS ORDERED** granting in part Defendants' Toho-Tolani County Improvement District and Coconino County's Notice of Service of "Motion to Amend Judgment on Mandate Against A. Miner Contracting, Inc.". Toho-Tolani County Improvement District is entitled to judgment against A. Miner Contracting, Inc. in the amount of \$381,990.00<sup>3</sup> as liquidated delay damages, but is only entitled to contract interest on that amount from March 6, 2015. Toho-Tolani shall lodge a form of judgment consistent with this Order by February 24, 2016.

---

<sup>3</sup> The District admits that it suffered only 354, rather than 364, days of delay and thus adjusted the liquidated delay damages from \$389,480.00 to \$381,990.00. *Motion to Amend*, p. 4, fnt 3.